

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1360

To be argued by
NATHANIEL H. AKERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1360

UNITED STATES OF AMERICA,

Appellee,

—v.—

IVAN GOLDMAN and RUDY LEWIS,

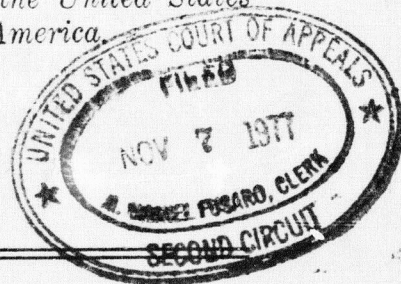
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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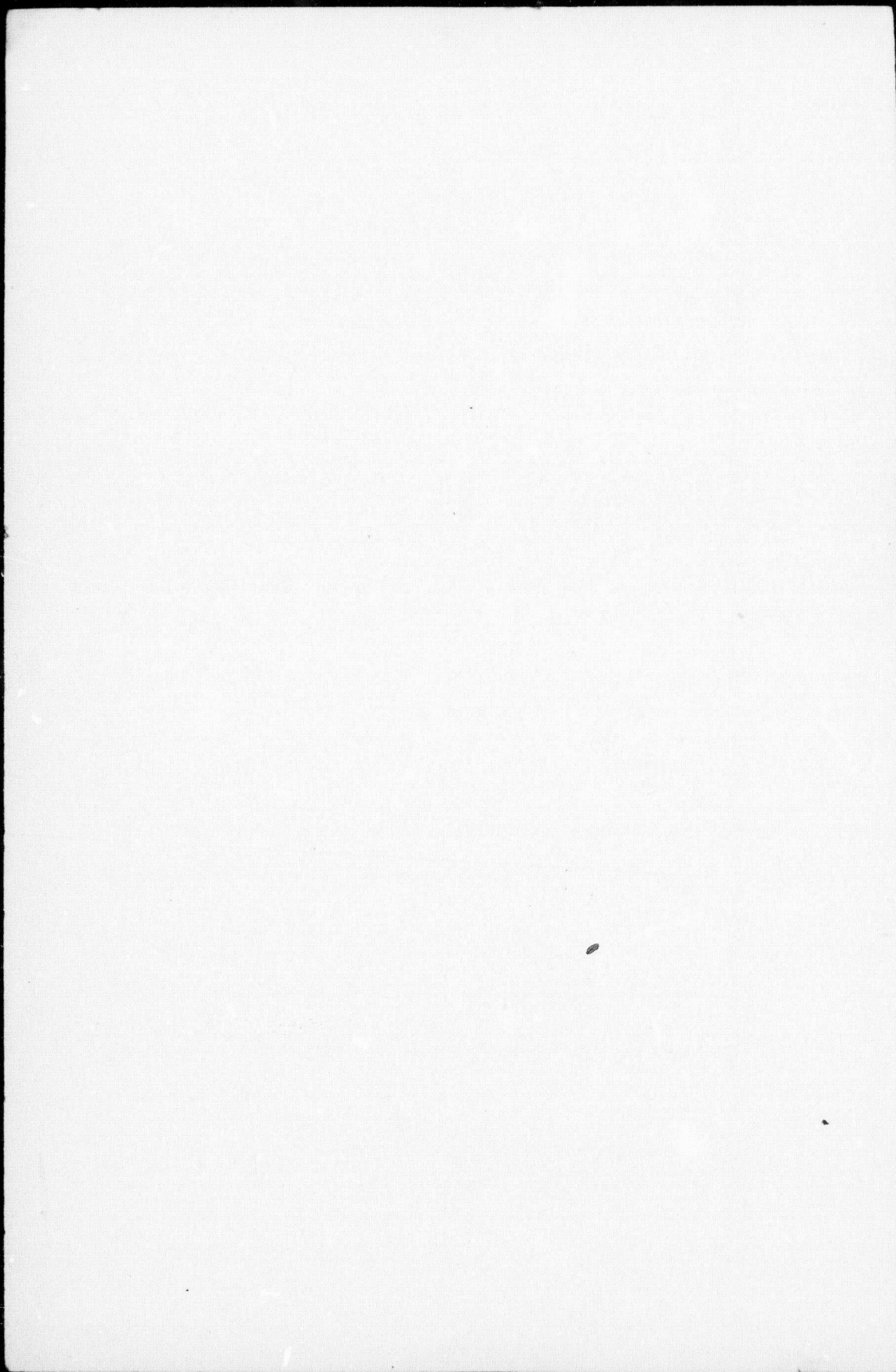


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
B. The Defendants' Case	6
ARGUMENT:	
POINT I—The Evidence that the Value of the Stolen Goods Was \$5,000 or More Was More Than Sufficient	7
POINT II—Judge Goettel Did Not Commit Reversible Error By Not Declaring a Mistrial As to the Substantive Counts	11
POINT III—Judge Goettel Did Not Commit Reversible Error by Instructing the Jury on the Defendant Lewis' Interest in the Case and His Motive for Falsely Testifying	15
POINT IV—Judge Goettel Did Not Abuse His Dis- cretion in His Supplementary Charge to the Jury to Encourage a Verdict in the Face of an Ap- parent Deadlock	18
CONCLUSION	23

TABLE OF CASES

<i>Allen v. United States</i> , 164 U.S. 492 (1896) ..	18, 20, 22
<i>Cavé v. United States</i> , 390 F.2d 58 (8th Cir.), <i>cert.</i> <i>denied</i> , 393 U.S. 801 (1968)	8

<i>Fulwood v. United States</i> , 369 F.2d 960 (C.A.D.C. 1966), cert. denied, 387 U.S. 934 (1967)	22
<i>Hicks v. United States</i> , 150 U.S. 442 (1893)	16, 17
<i>Reagan v. United States</i> , 157 U.S. 301 (1895) . . .	16, 17
<i>Shaffer v. United States</i> , 362 U.S. 511 (1960)	13
<i>United States v. Aiken</i> , 373 F.2d 294 (2d Cir.), cert. denied, 389 U.S. 833 (1967)	12, 13
<i>United States v. Barash</i> , 412 F.2d 26 (2d Cir.), cert. denied, 396 U.S. 832 (1969)	21
<i>United States v. Bentvena</i> , 319 F.2d 916 (2d Cir.), cert. denied, 375 U.S. 940 (1963)	12
<i>United States v. Bermudez</i> , 526 F.2d 89 (2d Cir. 1975)	20, 21, 22
<i>United States v. Bilotti</i> , 380 F.2d 649 (2d Cir.), cert. denied, 389 U.S. 944 (1967)	21
<i>United States v. Bowles</i> , 428 F.2d 592 (2d Cir.), cert. denied, 400 U.S. 928 (1970)	20, 21
<i>United States v. Branker</i> , 395 F.2d 881 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969) . .	12, 13
<i>United States v. Chaplin</i> , 435 F.2d 320 (2d Cir. 1970)	20
<i>United States v. Del Purgatorio</i> , 411 F.2d 84 (2d Cir. 1969)	12
<i>United States v. Eligisser</i> , 334 F.2d 103 (2d Cir.), cert. denied, 379 U.S. 879 (1964)	15
<i>United States v. Glasser</i> , 443 F.2d 994, 1006 (2d Cir.), cert. denied, 404 U.S. 854 (1971)	7
<i>United States v. Hynes</i> , 424 F.2d 754 (2d Cir.), cert. denied, 399 U.S. 933 (1970)	21, 22

	PAGE
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (<i>en banc</i>), <i>cert. denied</i> , 383 U.S. 907 (1966)	12
<i>United States v. Kahaner</i> , 317 F.2d 459 (2d Cir.), <i>cert. denied</i> , 375 U.S. 836 (1963)	21
<i>United States v. Kenner</i> , 354 F.2d 780 (2d Cir. 1965), <i>cert. denied</i> , 383 U.S. 958 (1966) ...	21, 22
<i>United States v. Mahler</i> , 363 F.2d 673 (2d Cir. 1966)	16, 17
<i>United States v. Manfredi</i> , 275 F.2d 588 (2d Cir.), <i>cert. denied</i> , 363 U.S. 828 (1960)	12, 15
<i>United States v. Martin</i> , 525 F.2d 703 (2d Cir.), <i>cert. denied</i> , 423 U.S. 1035 (1975)	16
<i>United States v. Martinez</i> , 446 F.2d 118 (2d Cir.), <i>cert. denied</i> , 404 U.S. 944 (1971)	20
<i>United States v. Meyers</i> , 410 F.2d 693 (2d Cir.), <i>cert. denied</i> , 396 U.S. 835, <i>rehearing denied</i> , 396 U.S. 949 (1969)	21
<i>United States v. Miley</i> , 513 F.2d 1191 (2d Cir.), <i>cert. denied</i> , 423 U.S. 842 (1975)	13
<i>United States v. Nall</i> , 437 F.2d 1177 (5th Cir. 1971)	9, 10
<i>United States v. Paccione</i> , 224 F.2d 801 (2d Cir.), <i>cert. denied</i> , 350 U.S. 896 (1955)	16
<i>United States v. Palumbo</i> , 317 F.2d 607 (2d Cir. 1963)	10
<i>United States v. Phillips</i> , 426 F.2d 1069 (2d Cir.), <i>cert. denied</i> , 400 U.S. 843 (1970)	9
<i>United States v. Rao</i> , 394 F.2d 354 (2d Cir.), <i>cert. denied</i> , 393 U.S. 845 (1968)	21, 22

	PAGE
<i>United States v. Sclafani</i> , 487 F.2d 245 (2d Cir.), cert. denied, 414 U.S. 1023 (1973)	16
<i>United States v. Sears</i> , 544 F.2d 585 (2d Cir. 1976)	11
<i>United States v. Stoner</i> , 487 F.2d 651 (6th Cir. 1973)	8
<i>United States v. Stromberg</i> , 268 F.2d 256 (2d Cir.), cert. denied, 361 U.S. 863 (1959)	11
<i>United States v. Sullivan</i> , 329 F.2d 755 (2d Cir.), cert. denied, 377 U.S. 1005 (1964)	16
<i>United States v. Taylor</i> , 530 F.2d 49 (5th Cir. 1976)	22
<i>United States v. Thomas</i> , 449 F.2d 1177 (D.C. Cir. 1971)	22
<i>United States v. Tippet</i> , 353 F.2d 335 (4th Cir. 1965), cert. denied, 383 U.S. 908 (1966)	9
<i>United States v. Variano</i> , 550 F.2d 1330 (2d Cir. 1977)	12, 13
<i>United States v. Wiley</i> , 519 F.2d 1348 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976)	7

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UNITED STATES OF AMERICA,

Appellee,

—v.—

IVAN GOLDMAN and RUDY LEWIS,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ivan Goldman and Rudy Lewis appeal from judgments of conviction entered on May 23, 1977, in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Gerard L. Goettel, United States District Judge, and a jury.

Indictment (S) 77 Cr. 97, filed on May 16, 1977, charged the two defendants in nine counts with violations relating to the interstate transportation of stolen goods. Count One charged both defendants with conspiracy to transport stolen textile goods in interstate commerce in violation of Title 18, United States Code, Section 371. Counts Two through Five charged the defendant Goldman with transporting stolen textile goods in interstate commerce, in violation of Title 18, United States Code, Section 2314. Counts Six through Nine charged the defendant Lewis with the same substantive offense.

Trial commenced on May 18, 1977. On May 19, 1977, Judge Goettel granted the defendants' motion to dismiss Count One of the indictment pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure and on May 20, 1977 Judge Goettel granted defendant Goldman's Rule 29(a) motion to dismiss Count Two. On May 23, 1977, the jury found the defendant Goldman guilty on Counts Three through Five and the defendant Lewis guilty on Counts Six through Nine.

On July 26, 1977, Judge Goettel sentenced the defendant Goldman to one year of imprisonment on each count, to run concurrently. On July 28, 1977, the defendant Lewis received an identical sentence.

The defendants are at liberty on bail pending appeal.

Statement of Facts

A. The Government's Case

The evidence against Goldman and Lewis demonstrated that they stole from their employer thousands of dollars of textile goods by shipping the goods to a buyer and keeping the proceeds of the sales for themselves. Goldman pocketed approximately \$8,289 in cash from this scheme. Lewis walked away with approximately \$22,492.

Goldman and Lewis were employed at the sales office of Guilford Mills, a textile producer, at 180 Madison Avenue in New York City. Guilford Mills manufactured cloth fabric in its plant at Greensboro, North Carolina. After the cloth was manufactured it was shipped to Cranston Print Works, Inc. in Fletcher, North Carolina, an independent processing company, which dyed the fabric. Goldman's and Lewis' job was to act as "converters," which meant that they directed the shipment of the dyed cloth from Cranston to the wholesale buyers who

were Guilford's customers. Up to June of 1975 Goldman was the head converter and Lewis was his assistant. In June, 1975, Goldman terminated his employment at Guilford Mills and Lewis became the head converter. The shipment orders to Cranston were placed over the telephone by either Goldman, Lewis or Nancy Kames, an employee in the converting department who reported directly to Goldman and Lewis. After an order was placed over the telephone, the only record that Guilford Mills would receive of the shipment from Cranston to the wholesale buyers were three copies of a bill of lading which would be sent to Lewis, who, in turn, would arrange for the wholesaler to be billed by Guilford. After receiving the bill, the wholesale buyers would pay Guilford by sending a check to a factoring company, to which Guilford's accounts receivable were assigned. (Tr. 203-10; 222, 233-39, 249, 280, 296).*

In late 1974 Goldman met in his office at 180 Madison Avenue with Michael Cohen, a free-lance textile broker who was in the business of arranging the sales of goods between manufacturers and wholesalers. At this meeting, which was Cohen's first business dealing with Guilford Mills, Goldman gave Cohen samples of cloth and told him Guilford's price for the goods. Cohen took the samples to Philip Eisenberg, an owner and operator of Bayer-Eisenberg Company, a wholesale buyer of cloth fabric, and Cohen negotiated a sale of the cloth by Guilford Mills to Bayer-Eisenberg. The goods were shipped to Bayer-Eisenberg on December 11, 1974 and on February 20, 1975, Bayer-Eisenberg paid for the goods by sending a check for \$2,078.05 to a factor of Guilford Mills. Cohen received his commission from Bayer-Eisenberg for arranging this sale. In early 1975 Cohen nego-

* "Tr." refers to pages in the trial transcript; "GX" refers to the Government's Exhibits; and "Br." refers to the brief of the specified appellant.

tiated several similar sales by Guilford Mills to Bayer-Eisenberg. (Tr. 16-21, 167-68, 174-76; GX 10, 11, 12, 13). However, in early 1975 Goldman asked Cohen whether he could effect the sales on an immediate cash basis. Cohen agreed to do this. As with the previous sales, Goldman gave Cohen a sales price and samples of the cloth. Cohen again brought the samples to Phillip Eisenberg of Bayer-Eisenberg and negotiated the sale of the cloth with Goldman giving the final approval to the agreed upon sales price. However, instead of payment being made to a factor, Cohen billed Bayer-Eisenberg on his own invoice and Bayer-Eisenberg paid Cohen for the goods with two checks made payable to Cohen. One check represented Cohen's commission. The second check, ostensibly representing the payment to Guilford Mills, was cashed by Cohen, who delivered the cash to Goldman at his office at 180 Madison Avenue. In the meantime, after the sale had been consummated, Goldman instructed Nancy Kames, an employee in Guilford's converting department, to direct the shipment of the cloth from Cranston to Bayer-Eisenberg. Although a bill of lading had been prepared by Cranston, and three copies had been sent to Guilford at 180 Madison Avenue, Bayer-Eisenberg was never billed by Guilford for the goods and no payment for the goods ever appeared on Guilford's books. Subsequently, three additional transactions occurred in which cash went to Goldman and Guilford was never paid for the cloth. The wholesale value of each of the four shipments was in excess of \$5,000. (Tr. 21-25, 31-44, 168-74, 211-13, 273-77, 294-96; GX 2, 2A, 2B, 2C, 2D, 3, 3A, 3B, 3C, 3D, 4, 4A, 4B, 4C, 4D, 4E, 5, 5A, 5B, 5C, 5D).

After Goldman terminated his employment with Guilford, Cohen received a telephone call from Lewis whom he had previously met through Goldman. In their telephone conversation Lewis mentioned that Goldman was no longer employed at Guilford and asked Cohen to meet him at his office at 180 Madison Avenue for the purpose

of arranging for the sale of some textile merchandise. Cohen met with Lewis, and Lewis gave him samples of cloth, a selling price for the cloth and asked him whether he could sell the cloth on an immediate cash basis in the same fashion that he had sold cloth for Goldman. (Tr. 25-28).

Cohen, as he had done for Goldman, brought the cloth samples to Philip Eisenberg and negotiated a sale. After the price was agreed upon and ultimately approved by Lewis, Lewis personally contacted Cranston and directed them to ship the goods to Bayer-Eisenberg. The goods were shipped, and three copies of the bills of lading were sent to Guilford at 180 Madison Avenue. The sale of the merchandise, however, was not recorded on Guilford's books. Repeating what he had done with Goldman, Cohen billed Bayer-Eisenberg for the goods on his own personal invoice. Bayer-Eisenberg paid the bill by giving two checks to Cohen, both made payable to him. Cohen took one check as his commission check; he cashed the other and gave the proceeds to Lewis. These proceeds, however, were not turned over to Guilford and payment for this shipment never appeared on Guilford's books. Over the next six months Lewis took cash for three additional sales of merchandise to Bayer-Eisenberg. Each of the five shipments were of a value in excess of \$5,000. (Tr. 28-30, 44-63, 213-15, 273-77, 296; GX 6A, 6B, 6C, 6D, 7A, 7B, 7C, 7D, 8A, 8B, 8C, 8D, 8E, 9A, 9B, 9C, 9D).

On January 5, 1977, Goldman was interviewed by Special Agents of the Federal Bureau of Investigation. After being advised of his Constitutional rights, Goldman signed a statement acknowledging that while he had been the head converter at Guilford Mills, he had dealt with Michael Cohen on several occasions. Goldman, however, denied that he had ever accepted cash from Cohen for customer payments to Guilford Mills. (Tr. 313-16; GX 15).

B. The Defendants' Case

The defendant Goldman called Howard Heller, a salesman at Guilford Mills, who testified that twenty-five cents a yard was not an unusual price for the cloth material purchased by Bayer-Eisenberg from Guilford Mills on January 15, 1975. This was one of the original sales from Guilford to Bayer-Eisenberg arranged by Cohen which had been paid for by Bayer-Eisenberg through a Guilford factor. Presumably, the purpose of this testimony was to undermine the testimony of George Greenberg, President of Guilford, that the same quality of cloth was worth 65 cents a yard.* On cross-examination, however, Heller testified that he had no knowledge of what variables were considered in pricing those particular goods. (Tr. 377-83; GX 16). In addition to Heller, Goldman called two witnesses who testified to his good character. (Tr. 403-08).

The defendant Lewis took the stand in his own behalf. He testified that while he has known Michael Cohen since 1973 and had seen him at Guilford's Office at 180 Madison Avenue several times with a man by the name of "David", he has never done any business with Cohen. Specifically, Lewis denied Cohen had ever made any cash payments to him. On cross-examination Lewis testified, among other things, that he did not know "David's" last name, that on occasion he would call Cranston to release goods to a wholesaler, and that he and Cohen have never held any grudge against each other. Lewis also called two character witnesses. (Tr. 410-33).

* See footnote, page 10, *infra*.

ARGUMENT

POINT I

The Evidence that the Value of the Stolen Goods Was \$5,000 or More Was More than Sufficient.

The defendant Goldman contends that there was insufficient evidence to prove that the value of the stolen goods charged in Counts Three through Five was \$5,000 or more. Contrary to this claim, Judge Goettel correctly determined that, upon the evidence taken as a whole, a reasonable mind might have fairly concluded beyond a reasonable doubt that the value of each of the shipments was \$5,000 or more. *United States v. Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States v. Glasser*, 443 F.2d 994, 1006 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). Indeed, there was overwhelming proof to that effect.

To prove the value of the stolen goods in each count of the indictment, the Government called George Greenberg, the President of Guilford Mills. Greenberg had been President of Guilford for one year, but prior to that had been employed at Guilford for nine years, and at other textile companies for twenty-one years. In the course of his thirty-one years in the textile industry, Greenberg had bought and sold textile products on numerous occasions, and as President of Guilford Mills was intimately familiar with the price of goods sold by his company. (Tr. 288-89).

For each shipment of goods charged in the indictment Greenberg examined the packing slips, collated them to the bills of lading, checked for yardage and quality, and then performed an evaluation of each of the shipments for their wholesale value. Greenberg based these wholesale values on the price that Guilford charged for those

same types of goods at or about the same time of the shipments to Bayer-Eisenberg. The wholesale values which Greenberg arrived at for Counts Two through Nine of the indictment were all \$5,000 or more, except for Count Two which Judge Goettel dismissed before the case went to the jury. (Tr. 289-9' 301, 369).*

Greenberg, the President of Guilford Mills, was certainly competent to testify to the wholesale value of the various shipments, both as the President of the company which was actually selling the goods to wholesalers and as an expert under Rule 702 of the Federal Rules of Evidence. Rule 702 provides, in pertinent part:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

As President of Guilford with thirty-one years experience in selling textiles, there can be little dispute that Greenberg is an expert on the value of cloth merchandise.

* The specific wholesale values which Greenberg testified to for each of the shipments in each count were as follows: Count Two (\$4,877); Count Three (\$6,417); Count Four (\$5,947); Count Five (\$5,814); Count Six (\$11,362); Count Seven (\$18,613) and Count Eight (\$17,817) and Count Nine (\$18,709). (Tr. 295-96).

Greenberg had also evaluated each shipment for its retail value which is the price Guilford would have sold the goods to a retailer. The retail value was obviously higher than the wholesale price. Judge Goettel, however, ruled that the Government was required to meet the jurisdictional amount with the wholesale value. (Tr. 291-92, 369). But see, *United States v. Stoner*, 487 F.2d 651, 653 (6th Cir. 1973); *Cave v. United States*, 390 F.2d 58, 67 (8th Cir.), *cert. denied*, 393 U.S. 801 (1968).

Goldman relies on *United States v. Nall*, 437 F.2d 1177 (5th Cir. 1971) for the proposition that "an owner's testimony of value of goods claimed to be stolen is not sufficient to establish the value under the statute. . . ." (Goldman Br. 9). This reliance is misplaced. In *Nall* the Court held that the testimony of the owner of securities was relevant to value, but that his "testimony of value alone was insufficient to support the verdicts of guilty because the presumption of the owner's special knowledge of the market value of the stock was so nearly negated by his own testimony as to render that testimony of little probative value." *United States v. Nall, supra*, 437 F.2d at 1187. Specifically, the Court rested its decision upon the stock owner's testimony that "the corporation [in which the stock was owned] was not paying dividends, was not in operation, that he knew of no sales of the stock, that he had not kept up with the corporation for more than six months or a year before the robbery [of the stock], and that he had forgotten that the [stock] certificates were in his safe and failed to report their loss until after they were returned to him." *United States v. Nall, supra*, 437 F.2d at 1187. Thus, contrary to the defendant's assertion, *Nall* stands for the proposition that an owner of stolen goods is competent to testify to the value of the goods. Indeed, in *United States v. Phillips*, 426 F.2d 1069, 1071 (2d Cir.), *cert. denied*, 400 U.S. 843 (1970), this Court affirmed a conviction for the interstate transportation of stolen property when the only evidence of value was testimony by the owner of the stolen goods. See also *United States v. Tippet*, 353 F.2d 335 (4th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

Moreover, and most significantly, the testimonial infirmities of the owner of stock which the Fifth Circuit delineated in *Nall* simply do not exist in this case. Unlike the owner of the corporate stock in *Nall*, who had not been familiar with the financial status of the corporation for more than six months or a year before the robbery, was not knowledgeable about any sales of

the stock, and was not an expert on the value of stocks, Greenberg as President of Guilford was actively involved in the sales of textiles at the time the goods were stolen and with thirty-one years experience in selling textiles was an expert on textile values. Furthermore, Greenberg had arrived at his values by comparing the documentation for the stolen goods against similar goods which had been sold to wholesalers at approximately the same time as the theft. In *United States v. Palumbo*, 317 F.2d 607, 608 (2d Cir. 1963), this Court upheld a conviction for theft under 18 U.S.C. § 659, where the only evidence of value was an invoice.

The price agreed upon between Cohen and Eisenberg for the stolen goods can hardly be relied upon as evidence of market value since the individuals who gave the selling prices to Cohen and who made the final determinations on the selling prices were Goldman and Lewis, the individuals who stole the goods. In that regard, Cohen's testimony that the price paid by Bayer-Eisenberg was not "unusual" had little or no significance since he was not familiar with the pricing structure of the merchandise at Guilford. His knowledge with respect to price was limited strictly to what Goldman or Lewis told him. The only crucial value is what the goods were actually worth on the wholesale market and that is what Greenberg testified to.* *United States v. Nall*, *supra*, 437 F.2d at 1186.

* Goldman also claims that "Mr. Greenberg was unable to explain how his own company could charge 25¢ per yard in a legitimate transaction for the very goods Mr. Greenberg was now claiming a value of 65¢ per yard." (Goldman Br. 10). To the contrary, Greenberg testified that a cheaper price could be charged if the cloth came from "odd cases" and the company was trying to clean out its sample room. In fact, Greenberg pointed to the fact that the sales invoices upon which these questions were asked of him were for sales of small quantities which were likely to be odd samples. (Tr. 61; GX 11, 12, 17).

[Footnote continued on following page]

Goldman's argument on this point comes down to a plea that this Court disregard Greenberg's testimony as to value on the ground that the evidence he gave on the issue was contradicted by other witnesses and inherently suspect since he, as the victim of the loss, was an "interested witness." (Goldman Br. 11). However, this amounts to no more than a request that this Court sit as a jury in this case, a function which this Court has consistently declined to undertake. *United States v. Sears*, 544 F.2d 585, 586 (2d Cir. 1976); *United States v. Stromberg*, 268 F.2d 256, 266 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). Goldman was free to try to persuade the trial jury to reject Greenberg's testimony on value. He made that effort without success. On appeal, this kind of attack on sufficiency must be rejected.

POINT II

Judge Goettel Did Not Commit Reversible Error By Not Declaring a Mistrial As to the Substantive Counts.

Goldman's remaining argument is that Judge Goettel committed reversible error by not declaring a mistrial as to the substantive counts after the conspiracy count was dismissed. Goldman asserts that "he was severely prejudiced" by having his case "submitted to the jury along with that of Lewis." (Goldman Br. 12). The weakness of this contention is underscored by the fact that neither

The only evidence as to value offered by the defendants was the testimony of Howard Heller, a salesman at Guilford who simply testified that while he had no responsibility for setting prices, the 25¢ price was not unusual. On cross-examination, however, Heller testified that he had no working knowledge of Guilford's pricing structure. (Tr. 377-83). Although the defendants certainly had the opportunity, no other evidence or testimony was offered to rebut Greenberg's valuations on each of the shipments charged in the indictment.

defendant ever moved for a mistrial after the conspiracy count was dismissed. *United States v. Manfredi*, 275 F.2d 588, 593 (2d Cir.), *cert. denied*, 363 U.S. 828 (1960). The failure to raise this issue below forecloses consideration of this issue on appeal. *United States v. Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969); *United States v. Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Moreover, Goldman has totally failed to show how he was prejudiced.* In determining whether a defendant has been prejudiced by having his case submitted to the jury after the dismissal of the conspiracy count this Court has "looked at several factors, including the number of substantive counts, the number of defendants, the length of the trial, the extent of the permissible evidence against each defendant, and the extent of the judge's cautionary instructions to the jury." *United States v. Variano*, *supra*, 550 F.2d at 1334. In this particular case all of these factors lead to the irresistible conclusion that the jury could not have possibly used the evidence of Lewis' guilt against Goldman. In a two day trial with only two defendants and seven counts representing seven separate and distinct transactions, it is unlikely in the extreme that the jury could have confused the evidence against Lewis with the evidence against Goldman. There were seven separate sets of documents for the proof of each shipment of goods to Bayer Eisenberg and the testimony of the witnesses was clearly delineated between those portions relating to Goldman and those portions re-

* The law in this Circuit is clear that for a mistrial to be declared there must be a showing of prejudice. *United States v. Variano*, 550 F.2d 1330, 1334 (2d Cir. 1977); *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967); *United States v. Branker*, 395 F.2d 881, 887 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969); *United States v. Bentvena*, 319 F.2d 916, 949-50, 955-56 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).

lating to Lewis. As in *Shaffer v. United States*, 362 U.S. 511, 515 (1960) which denied the defendant's claim of prejudice, the proof in this case "was carefully compartmentalized as to each" defendant. This is clearly not a case where there are a large number of counts and defendants resulting in a complex record making it "difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind." *United States v. Branker, supra*, 395 F.2d at 887-88. This Court has specifically refused to find prejudice in much lengthier and more complex cases than this where the evidence was far more disproportionate among individual defendants. *United States v. Variano, supra*, 550 F.2d at 1334; *United States v. Aiken, supra*, 375 F.2d at 300; *United States v. Miley*, 513 F.2d 1191, 1210 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975).

Goldman's claim that the case against him "was marginal at best" (Goldman Br. 12) and therefore the stronger evidence against Lewis spilled over to Goldman's detriment has absolutely no support in the record. In fact, to the contrary, the evidence against Goldman was stronger than the evidence against Lewis. The principal evidence against Lewis consisted simply of Cohen's testimony and the appearance of Lewis' name on Cranston forms which was written on the forms by Cranston employees. These forms proved that Lewis had directed the shipment of the stolen goods from Cranston to Bayer Eisenberg. The principal evidence against Goldman also included Cohen's testimony, but the additional proof that Goldman was responsible for directing the shipment of the goods from Cranston to Bayer Eisenberg were documents not in someone else's handwriting as in the case of Lewis but order forms in Goldman's own handwriting which had been given to Cohen at the time of each shipment. (Tr. 268-70; GX 2, 3, 4, 5). The information on

these forms corresponded precisely with the shipments to Bayer Eisenberg.*

Moreover, the slight possibility that the jury would improperly consider evidence of Lewis' guilt against Goldman was eliminated by Judge Goettel's instructions to the jury that it must consider the guilt of each defendant separately on each individual count. To insure that the jurors understood these instructions, the judge outlined the counts relating to each defendant. (Tr. 500-03). This Court has unequivocally stated that:

"It is now settled law in this Circuit that where several defendants are indicted jointly, all charged with conspiracy and one or more charged with various substantive offenses in the same general subject matter, and the conspiracy count is dismissed as against one or more of the defendants at the close of the prosecution's evidence, instructions to the jury with respect to the evidence to be considered by them against a particular defendant or defendants will be deemed a sufficient safeguard of the rights of such defendant or defendants 'in the absence of bad faith on the part of the government in bringing the conspiracy

* The Government did not, as the defendant Goldman claims, use the evidence of Lewis' culpability against Goldman "throughout the trial and in summation." (Goldman Br. 12). At no point in the trial did the Government take evidence of the illegal transactions which Lewis was involved in and explicitly or implicitly attribute them to Goldman. The only portion of the trial which Goldman specifically cites and to which he objected is that portion of the Government's rebuttal summation in which the Government responded to Goldman's claim in summation that Guilford's billing system did not work. (Tr. 465, 489-90). Judge Goettel specifically found that the Government's statement was proper rebuttal. (Tr. 490). In light of the fact that Goldman's counsel attacked the integrity of Guilford's entire billing system in his summation, Judge Goettel's ruling certainly cannot be said to be erroneous.

count,' or some special circumstances of an extraordinary and unusual character. . . ."

United States v. Manfredi, *supra*, 275 F.2d at 593; *United States v. Eligisser*, 334 F.2d 103, 107 (2d Cir.), *cert. denied*, 379 U.S. 879 (1964).

POINT III

Judge Goettel Did Not Commit Reversible Error by Instructing the Jury on the Defendant Lewis' Interest in the Case and His Motive for Falsely Testifying.

The defendant Lewis claims that Judge Goettel committed reversible error by instructing the jury on his interest in the case and his motive for falsely testifying. This contention is made without any support in law.

Judge Goettel's complete charge to the jury on the defendant Lewis' interest and motive was as follows:

The law permits but does not require a defendant to take the stand in his own behalf. In this case, the defendant Rudy Lewis took the stand. Obviously, the defendant has a deep personal interest in the result of this prosecution. Indeed, it is fair to say that a defendant has the greater stake in the outcome of the trial. Interest, as you know, creates a motive for false testifying. The greater the interest, the stronger the motive, and a defendant's interest in the result of a trial is of a character possessed by no other witness.

In appraising that defendant's credibility, you may take his interest in the outcome into consideration. However, it by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful

and straightforward story. It is for you to decide to what extent, if at all, his interest has colored his testimony. (Tr. 508-09).

The defendant submitted no alternative charge to the Court, at the charging conference counsel for the defendant Lewis specifically stated that he did not have any objection to the general instructions requested by the Government (Tr. 389), and counsel did not object when the charge was given. Rule 30 of the Federal Rules of Criminal Procedure makes it clear that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Lewis' failure to object notwithstanding, this Court in *United States v. Martin*, 525 F.2d 703 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975) approved an almost identical charge, and reaffirmed the well settled principle that a trial judge's "instruction may properly point out the defendant's special interest in a case." *United States v. Sullivan*, 329 F.2d 755, 757 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964). See also *Reagan v. United States*, 157 U.S. 301 (1895); *United States v. Sclafani*, 487 F.2d 245, 257 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973); *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. 1966); *United States v. Sullivan*, 329 F.2d 755, 756-57 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964); *United States v. Paccione*, 224 F.2d 801, 803 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955).*

Hicks v. United States, 150 U.S. 442 (1893), the only case which Lewis advances in support of his claim is not applicable to the charge in this case. In *Regan v.*

* There is not the slightest suggestion in any of the case law for Lewis' claim that the length or complexity of a trial should affect the validity of this charge.

United States, supra, 157 U.S. at 309, the Supreme Court made it clear that the instruction reviewed by the Court in *Hicks* "was condemned, because of the assumption in it that the other witnesses were 'telling the truth.'" The Court made it clear, however, that the trial judge "may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony." *Reagan v. United States, supra*, 157 U.S. at 310.

In direct contrast to *Hicks*, there was nothing in Judge Goettel's charge that could have led the jury to assume that the defendant was lying and the other witnesses were telling the truth. To the contrary, Judge Goettel made it clear that even though Lewis had an interest and motive to testify falsely, it did not mean that he was "not capable of telling a truthful and straightforward story." (Tr. 509). Moreover, immediately after Judge Goettel gave this instruction to the jury, he also cautioned them on the motives of other witnesses. Most significantly he gave them a separate charge on Michael Cohen instructing them that if they found that "Mr. Cohen was himself involved in a criminal enterprise with any person, then [they could] consider this involvement in assessing whether or not Mr. Cohen had a motive to lie when he implicated the defendants Goldman or Lewis." (Tr. 509). In that the single most significant issue for the jury to decide was whether to believe Cohen or Lewis, Judge Goettel's charge was extremely fair to both the Government and the defendants. See *United States v. Mahler, supra*, 363 F.2d at 678.

POINT IV

Judge Goettel Did Not Abuse His Discretion in His Supplementary Charge to the Jury to Encourage a Verdict in the Face of an Apparent Deadlock.

The defendant Lewis asserts that Judge Goettel's supplementary charge to the jury to encourage a verdict in the face of an apparent deadlock "went beyond the permissible limits of . . . the charge" approved by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492 (1896) (Lewis Br. 10). Specifically, the defendant claims that the charge was coercive because of (1) the cumulative effect of a trial of short duration, the Judge's statement that the case was simple and inclusion in the charge that there is "no reason to suppose that any other jury is going to be of better quality and decide it differently from you," (Tr. 536), (2) that portion of the charge stating that "[i]t certainly is not the law that each juror should not listen with deference to arguments and with a distrust of his own views" (Tr. 535), and (3) that portion of the charge making reference to the "considerable costs in money and time to both sides if a retrial is necessary" (Tr. 536). These claims are totally unfounded.

After six hours of deliberations, the jury handed Judge Goettel a note at 10:35 p.m. stating that they were deadlocked. The next morning, Judge Goettel instructed the jury as follows:

While undoubtedly the verdict of a jury should represent the opinion of each juror, it by no means follows that opinions may not be changed by conference in the jury room.

The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly

is not the law that each juror should not listen with deference to arguments and with a distrust of his own views, his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself.

A juror should not go into the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men and women who are equally honest and equally intelligent as himself.

Remember, at all times that no juror is expected to yield the conscientious conviction he or she may have as to the weight or effect of the evidence, but remember, also, that after a full deliberation and consideration of all the evidence, it is your duty to agree upon the verdict if you can do so without violating your individual judgment and conscience.

The considerable costs in money and time to both sides if a retrial is necessary suggests that if it is possible for you jurors to reach a unanimous verdict without any juror yielding a conscientious conviction you should do so. Our law requires a retrial unless the jury is unanimous and there is no reason to suppose that any other jury is going to be of better quality and decide it differently from you.

You may conduct your deliberations as you choose, but I suggest that you now carefully re-examine and reconsider all the evidence in the case bearing upon the questions before you. If you need any of the testimony read back to you, you need only indicate what portion it is and we will have the reporter find it for you and read it to you.

You may be as leisurely in your deliberations as the occasion may require and you shall take all the time which you may feel is necessary.

You may now retire and continue your deliberations in such manner as shall be determined by your good and conscientious judgment as reasonable men and women. (Tr. 535-37).

Neither defense counsel objected to the language of this charge, the jury subsequently requested certain testimony to be read, and four hours after the charge had been given the jury returned with its verdict. (Tr. 538). The defendant's failure to object to the specific language of the charge at trial is by itself a sufficient ground for rejecting his belated claim of error. *United States v. Martinez*, 446 F.2d 118, 120 (2d Cir.), cert. denied, 404 U.S. 944 (1971); *United States v. Chaplin*, 435 F.2d 320, 323 n.2 (2d Cir. 1970); *United States v. Bowles*, 428 F.2d 592, 595 (2d Cir.), cert. denied, 400 U.S. 928 (1970).

Moreover, every portion of Judge Goettel's charge challenged by the defendant Lewis on this appeal has been held by this Court to be properly within the purview of *Allen v. United States* and therefore not coercive. As the defendant Lewis concedes, in *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), this Court upheld an *Allen* charge in which the trial judge precisely stated that "there is no reason to suppose that any other jury is going to be of better quality and decide it differently than you." The defendant's attempt to distinguish *Bermudez* on the grounds that the instant case was of a shorter duration and of a less complicated nature is unsupportable. The controlling facts in the *Bermudez* decision were not the length or complexity of the case but rather the language of the charge which the Court held "did not coerce a verdict, or direct the jury to reach any result."

United States v. Bermudez, *supra*, 526 F.2d at 100. The major case upon which *Bermudez* cited and quoted from was *United States v. Hynes*, 424 F.2d 754, 757 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970), an even simpler and shorter case than the one presently before this Court. The *Hynes* decision upheld a conviction from a one day trial where the only issue was whether or not the two counterfeit twenty dollar bills found on the defendant's possession were known by the defendant to be counterfeit. The jury in that case was given the *Allen* charge after they had deliberated only two hours and fifty minutes.*

Moreover, Judge Goettel's statement at the conclusion of his original instructions to the jury that the case was simple can hardly be said to have had a coercive effect in forcing the jury to reach a verdict. This statement was made by the judge just prior to his brief summary of the evidence. (Tr. 512-13). It was in no fashion tied

* In *United States v. Meyers*, 410 F.2d 693, 696-97 (2d Cir.), *cert. denied*, 396 U.S. 835, rehearing denied, 396 U.S. 949 (1969), this Court specifically rejected a defendant's contention that the "Allen charge" was "coercive because the trial was only a day and a half and the jury had deliberated for only a short time." *Meyers* held that "[t]he judge's warning that 'under no circumstances must any juror yield his conscientious judgment' makes the use of the Allen charge proper and not coercive." This is the precise language used by Judge Goettel in his "Allen charge". See also *United States v. Bermudez*, *supra*, 526 F.2d at 99-100; *United States v. Bowles*, *supra*, 428 F.2d at 595; *United States v. Hynes*, *supra*, 424 F.2d at 757; *United States v. Barash*, 412 F.2d 26, 31 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969); *United States v. Rao*, 394 F.2d 354, 355 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968); *United States v. Bilotti*, 380 F.2d 649, 654 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Kenner*, 354 F.2d 780, 783 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); *United States v. Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

to the "Allen charge" which was given on the following day.*

Also, in *United States v. Kenner*, *supra*, 354 F.2d at 782, this Court upheld the identical language charged by Judge Goettel with respect to a juror distrusting his own view. This precise language is lifted from *Allen v. United States*, *supra*, 164 U.S. at 501. Indeed, even *Fulwood v. United States*, 369 F.2d 960, 962 (C.A.D.C. 1966), *cert. denied*, 387 U.S. 934 (1967), the one case cited by the defendant on this point, affirmed a conviction in which the judge gave an "Allen charge" which included the statement "that a juror should 'distrust' his judgment if he finds the large majority takes a different view."

Finally, this Court has unequivocally held that the justification for the "Allen charge" is predicated upon avoiding the costs of another trial and, therefore, there is nothing improper about charging the jury that there are "considerable costs in money and time to both sides if a retrial is necessary." *United States v. Bermudez*, *supra*, 526 F.2d at 99; *United States v. Hynes*, *supra*, 424 F.2d at 757; *United States v. Rao*, *supra*, 394 F.2d at 355.

* This case is also readily distinguishable from the two cases cited by the defendant—*United States v. Taylor*, 530 F.2d 49, 52 (5th Cir. 1976) "where . . . [the] judge . . . implied [to the jury] his opinion of the correct outcome of the case" and *United States v. Thomas*, 449 F.2d 1177, 1183 (D.C. Cir. 1971) where the judge made comments beyond the standard "Allen charge" which the court found tended to coerce the jury into reaching a verdict.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1977—

714-059-681

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deposes and says that he is employed in the office of
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That on the 7th day of November, 1977,
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